APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-50681
D.C. No. CR-91-1022-WMB

United States Of America,
Plaintiff-Appellee,
v.
Hughes Aircraft Co., Inc.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
WILLIAM MATTHEW BYRNE, JR.,
DISTRICT JUDGE, PRESIDING

Argued and Submitted December 6, 1993
Decided March 28, 1994
Amended April 28, 1994

Before: TANG, D.W. NELSON, and LEAVY, Circuit Judges

PER CURIAM

Per Curiam:

Hughes Aircraft Co., Inc. ("Hughes") appeals from its conviction and sentence for conspiring to defraud and make false statements to the federal government. We affirm.

FACTS AND PRIOR PROCEEDINGS

Hughes contracted with the United States to manufacture microelectronic circuits, known as "hybrids," which are used as components in weapons defense systems. The contracts required Hughes to perform a series of tests on each hybrid. As the hybrids made their way through the testing process, they were accompanied by paperwork indicating what tests had been performed, the results of those tests, and the identity of the operator of the testing equipment.

Hughes's former employee, Donald LaRue ("LaRue"), was a supervisor responsible for ensuring the accuracy of the hybrid testing process. LaRue arranged for the paperwork to indicate falsely that all tests had been performed and that each hybrid had passed each test. When LaRue's subordinates called his actions to the attention of LaRue's supervisors, the supervisors did nothing about it. Instead, they responded that LaRue's decisions were his own and were not to be questioned by his subordinates.

Hughes and LaRue were charged with one count of conspiracy to defraud and make false statements to the United States in violation of 18 U.S.C. § 371,[1] and two counts of making false statements in furtherance of that conspiracy in violation of 18 U.S.C. § 1001.[2] LaRue was acquitted on all

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[1] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. § 371.

[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or

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counts. Hughes was convicted of the conspiracy charge, but acquitted of the other two charges.[3] Hughes appeals from both its conviction and fine of $3.5 million.

ANALYSIS

I. CONVICTION

A. Standard of Review

Hughes raises several arguments in support of the contention that its conviction under § 371 must be overturned as a matter of law. Because these arguments present pure questions of law, we review them de novo. *See Anderson v. United States*, 966 F.2d 487, 489 (9th Cir. 1992).

B. Discussion

1. Inconsistent Verdicts

Hughes first argues that it must be acquitted as a matter of law because the same jury that convicted Hughes acquitted its "indispensable co-conspirator," LaRue, of the identical charges on identical evidence. Hughes bases its argument on three Supreme Court cases from the 1930's and 1940's,[4]

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[2] (...continued)
covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1001.

[3] Hughes was charged with 50 additional counts of false statements to the United States. These counts were severed and await resolution of this appeal.

[4] Those three cases do not support Hughes's contention because none dealt with inconsistent jury verdicts. In *Hartzel v. United States*, 322 U.S. 680 (1944), the trial court set aside the conviction of two of three co-conspirators. The Court concluded "the setting aside of [the two co-conspirators'] convictions makes it impossible to sustain petitioner's conviction upon the basis of . . . the conspiracy count." *Id.* at 682 n.3. In *Morrison v. California*, 291 U.S. 82 (1934), the Court found that the evidence was insufficient to
(continued...)

arguing that they provide an exception to the general rule that inconsistency of jury verdicts is not a ground for reversal. *See Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Powell*, 469 U.S. 57, 64-65 (1984). According to Hughes, the post-*Dunn* Supreme Court cases indicate that the inconsistent verdict rule applies only to situations involving inconsistencies in multiple verdicts against a single defendant, not inconsistencies in multiple verdicts against multiple defendants. Controlling Ninth Circuit precedent precludes us from adopting such a rule.

In *United States v. Valles-Valencia*, 811 F.2d 1232 (9th Cir.), as amended by 823 F.2d 381 (1987), the defendant argued that, because his sole co-conspirator was acquitted, his own conviction for conspiracy was impossible as a matter of law. Initially we agreed and stated "the acquittal of all but one of the conspirators signifies that the jury found no agreement to act, and the remaining conspirator cannot have [conspired with himself] since '[c]onspiracy requires a plurality of actors. . . .'" 811 F.2d at 1239 (quoting *United States v. Wright*, 742 F.2d 1215, 1224 (9th Cir. 1984)). In response to the subsequent Supreme Court decision in *Powell*, however, we amended our ruling, stating that

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[4] (...continued)
support one of the co-conspirator's convictions. Thus, the Court noted "[i]t is impossible in the nature of things for a man to conspire with himself" and ruled "[t]he conviction failing as to the one defendant must fail as to the other." *Id.* at 92 & 93. Finally, in *Gebardi v. United States*, 287 U.S. 112 (1932), the Court ordered an acquittal of a woman convicted of conspiring with a man to violate the Mann Act (transporting a woman interstate for the purposes of prostitution) because the evidence was insufficient to support her conviction. The Court noted that under the Mann Act the woman's consent was not criminal. *Id.* at 123. Thus, her consent, without more, was insufficient evidence to convict her of conspiracy to violate the Mann Act. *Id.* The Court concluded "[a]s there was no proof that the man conspired with anyone else to bring about the transportation, the convictions of both petitioners must be [r]eversed." *Id.*

> [I]nconsistent verdicts can just as easily be the result of jury lenity as a determination of the facts. Thus, the acquittal of all conspirators but one does not necessarily indicate that the jury found no agreement to act. Moreover, the Court has rejected a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. The fact that the conflict in this case involves charges against different defendants, rather than different charges against the same defendant does not affect the rationale.

823 F.2d at 381-82 (internal quotation and citation omitted).

The Supreme Court's decision in *Powell* supports this extension of the application of the *Dunn* rule insulating inconsistent jury verdicts from appellate review. "[T]he Government's inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity—suggests that the best course to take is simply to insulate jury verdicts from review on [inconsistency] ground." *Powell*, 469 U.S. at 68-69. Contrary to Hughes's contentions, this Circuit has not recognized a post-*Powell* exception to the *Dunn* rule.[5] Accordingly, the conviction of one

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[5] To support this contention, Hughes cites *United States v. Hart*, 963 F.2d 1278 (9th Cir. 1992); *United States v. Guzman*, 849 F.2d 447 (9th Cir. 1988); and *United States v. Marchini*, 797 F.2d 759 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). Because each of these cases dealt with inconsistent verdicts against single defendants, they are inapplicable to Hughes's contention that we have recognized an exception to *Dunn* for inconsistent verdicts against multiple defendants. Moreover, each of these three cases holds that inconsistent verdicts can stand, even in the presence of a conviction that is rationally incompatible with an acquittal, provided sufficient evidence exists to support a verdict of guilt. *See Hart*, 963 F.2d at

(continued...)

co-conspirator is valid even when all the other co-conspirators are acquitted.

2. Respondeat Superior

Hughes next argues that it is entitled to a judgment of acquittal because the evidence against it and LaRue was identical, yet one was convicted while the other was acquitted.[6] This argument is predicated on the assumption that LaRue was the sole employee for whose actions Hughes could be found vicariously guilty and that the evidence against each of the two defendants was necessarily identical. However, some of the evidence of conspiracy was offered against Hughes alone. Moreover, as this evidence indicates, the jury could have found Hughes guilty based on the actions or omissions of its

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[5] (...continued)
1281; *Guzman*, 849 F.2d at 448; *Marchini*, 797 F.2d at 765. Hughes does not challenge the sufficiency of the evidence.

[6] This argument is simply a variation of the inconsistent jury verdicts contention set out in part 1, *supra*.

Hughes cites to *United States v. Duz-Mor Diagnostic Labs, Inc.*, 650 F.2d 223 (9th Cir. 1981), as support for this argument. In *Duz-Mor* the trial court granted a motion to dismiss the indictment against the only employee whose actions could have led to corporate vicarious liability, but denied the corporate employer's motion to dismiss. *Id.* at 225. On appeal we noted two exceptions to the general rule that inconsistencies in jury verdicts rendered in the same proceeding do not require reversal.

The first exception involves "the inconsistent conviction of a conspirator whose alleged co-conspirators have been acquitted." *Id.* However, this exception to *Dunn* was overruled in *Powell*, 469 U.S. at 64-65 ("[W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt'" (quoting *Dunn*, 284 U.S. at 393)). The second exception, which applies to "inconsistent multiple convictions, where the defendant could be guilty of either, but not both, charged offenses[,]" *id.* at 226 n.3, is clearly irrelevant to the facts of the instant appeal.

Moreover, *Duz-Mor* involved a bench trial, to which the *Powell* rationale does not apply.

supervisors and employees other than LaRue. As Hughes's assumption that the facts against both defendants were identical is erroneous, and no other facts support its argument, we reject this contention.

3. Statutory Construction

Hughes's third argument is that the plain language of 18 U.S.C. § 371, which states that if "two or more persons conspire . . . each" may be punished, prevents its conviction because it is legally impossible for a party to conspire with itself. Hughes argues that, because it is vicariously liable for each of its employees, a conspiracy between employees would necessitate a finding that Hughes conspired with itself. We reject this creative construction. The statutory language does not exclude criminal liability for a corporation simply because its employees are the actual conspirators. To rule otherwise would effectively insulate all corporations from liability for conspiracies involving only employees acting on behalf of that corporation. We hold that a corporate may be liable under § 371 for conspiracies entered into by its agents and employees. *See United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984).

Nonetheless, Hughes argues that the statute is ambiguous and that the rule of lenity compels a reversal of its conviction. *See United States v. LeCoe*, 936 F.2d 398, 402 (9th Cir. 1991). However, the Supreme Court recently explained that "[t]his maxim of statutory construction . . . cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Taylor v. United States*, 495 U.S. 575, 596 (1990). Moreover, the rule of lenity is not "'to be used in complete disregard of the purpose of the legislature.'" *Perrin v. United States*, 444 U.S. 37, 49 n.13 (1979) (quoting *United States v. Culbert*, 435 U.S. 371, 379 (1978)). Because the interpretation offered by Hughes is implausible and would undermine the purpose of the statute, we reject it.

4. The Intracorporate Conspiracy Doctrine In Antitrust Law

Hughes also contends that we should extend the reach of the intracorporate conspiracy doctrine in antitrust law, which holds that a conspiracy requires "an agreement among two or more persons or distinct business entities." *Calculators Hawaii, Inc. v. Brandt Inc.*, 724 F.2d 1332, 1336 (9th Cir. 1983). *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Harvey v. Fearless Farris Wholesale Inc.*, 589 F.2d 451, 455 (9th Cir. 1979). While this doctrine has been extended by some circuits to civil rights cases, *see e.g. Buschi v. Kirven*, 775 F.2d 1240, 1251 (4th Cir. 1985); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972), other circuits have declined to do so, *see e.g. Dussouy v. Gulf Coast Invest. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981), and we have reserved the issue. *See Portman v. County of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993) (listing cases).

However, this doctrine has never been applied to criminal cases. As the First Circuit noted, "There is a world of difference between invoking the fiction of corporate personality to *subject* a corporation to civil liability for acts of its agents and invoking it to *shield* a corporation or its agents from criminal liability where its agents acted on its behalf." *Peters*, 732 F.2d at 1008 n.7. Every other circuit to address the issue has come to the same conclusion. *See United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990); *United States v. Stevens*, 909 F.2d 431, 432 (11th Cir. 1990); *United States v. Hughes Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986); *Dussouy*, 660 F.2d at 603.

Hughes argues that public policy requires us to apply the intracorporate conspiracy doctrine to criminal cases. However, a stronger public policy mandates a contrary result. Simply because no other corporation or individual is involved, or there is no joining of previously divergent goals, does not mean there is no conspiracy. If we applied the intracorporate conspiracy doctrine to this case, no corporation acting on its own behalf by

and through its employees could be found guilty of conspiracy. This result is illogical.

We decline to extend the intracorporate conspiracy doctrine to criminal activity.

5. Wharton's Rule

Wharton's Rule prevents a conspiracy conviction when an underlying substantive offense requires more than one actor, such as adultery or dueling, and in which "the immediate consequences of the crime rest on the parties themselves rather than on society." *Iannelli v. United States*, 420 U.S. 770, 782-83 (1975). Here we have a conspiracy to defraud the government, a violation of 18 U.S.C. § 1001.

Hughes argues that a corporation could only violate 18 U.S.C. § 1001 through the efforts of at least two of its employees due to the supervisory and reporting structure of a corporation. Of course, that is not true: a corporation could be liable under § 1001 for false statements to the government by just one of its employees. A conspiracy arises when more than one of its employees agree to defraud the government.

Moreover, the consequences of government fraud certainly do not rest on the parties themselves rather than society. Government fraud has an adverse effect on the government treasury, the quality of government projects, and in cases such as this one, the safety of individuals utilizing the government goods purchased.

This argument is rejected.

Because we find no merit to any of Hughes's arguments on this point, we affirm the conviction.

II. SENTENCING

A. Standard Of Review

We review *de novo* the legality of a sentence, *United States v. Heim*, 15 F.3d 830, 831 (9th Cir. Jan. 24, 1994), while we examine the district court's factual determinations

underlying that sentence for clear error. *United States v. Mainard*, 5 F.3d 404, 405 (9th Cir. 1993).

B. Discussion

1. Findings Under Federal Rule of Criminal Procedure 32

Hughes first contends that, because there was a dispute regarding the amount of the fine to be imposed, the district court was required to make written findings under Federal Rule of Criminal Procedure 32(c)(3)(D). The Rule provides that when a defendant "allege[s] any factual inaccuracy in the presentence investigation report . . . the court shall, as to each matter controverted, either make (i) a finding as to the allegation or (ii) . . . [state that] the matter controverted will not be taken into account in sentencing." Fed. R. Crim. P. 32(c)(3)(D).

Here, the dispute did not concern any factual matter in the presentence report, but rather a contention made by the government in its sentencing memorandum. Thus, no written factual findings were required, and Rule 32(c)(3)(D) does not apply. *See United States v. Rachels*, 820 F.2d 325, 327 (9th Cir. 1987). Moreover, Hughes failed to object to the fact that the presentence report did not address the loss to the government and has thus waived any claim that the presentence report was not properly completed.

2. Calculation Of Fine

Hughes also contends that the district court improperly calculated the amount of its fine in several ways. The alternative fines provision permits a sentencing court to fine a defendant "not more than the greater of twice the gross gain or twice the gross loss" caused by the crime. Former 18 U.S.C. § 3623(c)(1).[7] This section does not require specific findings of

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[7] "If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not

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the exact loss. Thus, the only question before us is whether the district court made sufficient findings on the record that the loss to the government was at least one half of $3.5 million, or $1.75 million.

In its sentencing memorandum, the government acknowledged that the exact amount of its losses in this case would be impossible to calculate. However, it offered two alternative bases for calculating its pecuniary loss, which provided the court with an adequate foundation for its $3.5 million assessment. The district court made the following finding:

> The other factor in the fine is how much can you precisely calculate? How precise must you be? . . . I think the test can probably be by a preponderance of the evidence. How do you calculate the loss? While the government has made a good faith effort to present some data along with declarations of memorandums from various people, it is hard to be precise and I think the government concedes that is difficult for them to be precise on what its loss is. I think there was some loss. I can't be any more precise to the exact loss than can the government in its presentation.

[SER 151.] Under the government's calculations, which Hughes has not shown are incorrect, the court could have fined Hughes anywhere from $17.6 million to $984 million. Although the district court's findings were vague, they were sufficiently supported to uphold the fine imposed.

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[7] (...continued)
more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. § 3623(c)(1) (repealed).

Hughes also argues that the district court erroneously based the fine on the cost of this prosecution. Hughes bases its claim on the district court's comments:

> Again, I guess one of the factors that might be considered in appropriateness of the fine is how much money it cost the government to bring this action. I don't have that figure, but I know it is in the millions to bring this action, but that cannot be the sole basis of the fine.

[SER 158.] The last phrase clarifies that the district court did not in fact *base* the fine on the costs of prosecution, and it is unnecessary to address Hughes's arguments that it lacked notice of or the opportunity to dispute the prosecution costs in violation of its due process rights, and that this burdened its right to plead not guilty.

Hughes finally argues that the government is not a "person" under 18 U.S.C. § 3623 because "person" is defined under 1 U.S.C. § 1 as including only "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." However, this statutory definition of "person" is not an exhaustive list: Section 1 provides simply that "person" *includes* the above. We hold that the government is a "person" under 18 U.S.C. § 3623.

The sentence imposed by the district court was not an abuse of discretion.

CONCLUSION

The conviction and sentence are AFFIRMED.

APPENDIX B

[Filed May 13, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-50681
D.C. No. CR-91-1022-WMB

United States Of America,
Plaintiff-Appellee,
v.
Hughes Aircraft Co., Inc.,
Defendant-Appellant.

ORDER

Before: TANG, D.W. NELSON, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges D.W. Nelson and Leavy have voted to reject the suggestions for rehearing en banc, and Judge Tang has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

[Filed September 8, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal No. 91-1022 WMB

United States Of America,
Plaintiff,

v.

Hughes Aircraft Co., Inc. and Donald Anthony LaRue,
Defendants.

ORDER DENYING MOTION FOR
JUDGMENT OF ACQUITTAL OR NEW TRIAL

I. Background.

Defendant Hughes Aircraft Co., Inc. ("Hughes") and defendant Donald LaRue, a former Hughes employee, were charged with conspiracy to defraud the United States in violation of 18 U.S.C. §§ 371 and 1001. During the trial, Hughes, the government and the Court agreed that Hughes could be guilty of conspiracy only if LaRue was found to have conspired with one of four unindicted Hughes employees. 14 Trans. p. 69, lines 14-25 (6/9/92). The jury was so instructed. Court's Instructions to the Jury, p. 11 lines 10-13. Despite these instructions and a paucity of evidence at trial supporting any other theory of Hughes' culpability, the jury acquitted LaRue and convicted Hughes. Before the Court is

Hughes' motion for judgment of acquittal under F.R.Crim.P. 29(c), and, in the alternative, for a new trial under F.R.Crim.P. 33.

Acknowledging the impropriety of speculation about or inquiry into the jury's reasoning, *United States v. Powell*, 469 U.S. 57, 66-67, 105 S.Ct. 471 (1984), Hughes offers three bases for its motion. First, Hughes argues in the wake of LaRue's acquittal that the vicarious nature of Hughes' criminal liability distinguishes this case from the line of authority insulating inconsistency in criminal verdicts from judicial review. Second, defendant argues that in the Ninth Circuit and on the facts of this case, the so-called "rule of consistency" (requiring acquittal of an alleged conspirator in a joint conspiracy trial where the other defendants have been acquitted) survives that same line of authority. Third, defendant argues that without regard to LaRue's acquittal, the evidence supporting Hughes' conviction is legally insufficient. Alternatively, defendant moves for a new trial.

II. The Motion For Judgment Of Acquittal.

A. *United States v. Powell* and the *Dunn* Rule.

In *Dunn v. United States*, 52 S.Ct. 189 (1932), the Supreme Court held that a criminal defendant convicted by a jury on one count could not attack that conviction simply because it was inconsistent with the jury's verdict on another count.[1] The Court stated that "[c]onsistency in the verdict is not necessary," relying in part on a now inapplicable argument that had the counts been presented in separate indictments, an acquittal on one would not have had *res judicata* effect as to another. The Court also quoted *Steckler v. United States*, 7 F.2d 59, 60 (2nd Cir. 1925), as follows:

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[1] In *Dunn* the defendant had been convicted of maintaining a common nuisance by keeping intoxicating liquor for sale at a specified place, but had been acquitted of unlawful possession and unlawful sale of such liquor.

> The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more that their assumption of a power which they had not the right to exercise, but to which they were disposed through lenity.

52 S.Ct. at 190.

The Dunn rule was later invoked by the Supreme Court in the context of corporate criminal liability. In *United States v. Dotterweich*, 64 S.Ct. 134 (1943), Dotterweich was found guilty of shipping misbranded drugs in interstate commerce and of shipping an adulterated drug, but the corporation of which he was president and general manager was not convicted. Dotterweich argued that having failed to find the corporation guilty, the jury could not find him guilty. Citing *Dunn*, the Court held as follows:

> [w]hether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries.

65 S.Ct. at 135.

The *Dunn* rule was reinforced more recently in *United States v. Powell*, 105 S.Ct. 471 (1984). Powell had been convicted of three compound offenses of using the telephone in "committing and in causing and facilitating" certain felonies, but she had been acquitted of two counts—conspiracy to possess cocaine with intent to distribute, and possession of cocaine with intent to distribute—proof of which was an element of the telephone facilitation counts. On appeal, the Ninth Circuit held

that an exception to *Dunn* obtains where the defendant is convicted under 21 U.S.C. § 843(b) (telephone facilitation) but acquitted of the underlying felony. 719 F.2d 1480 (9th Cir. 1983). The Supreme Court reversed, reaffirming the *Dunn* rule and taking issue with a number of circuit decisions which had carved out exceptions to it. 105 S.Ct. at 476. The Court stated that "the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata...." 105 S.Ct. at 476. Noting that the Double Jeopardy Clause prevents the government from appealing an inconsistent acquittal, the Court further stated:

> [i]nconsistent verdicts ... present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. *Harris v. Rivera*[2] ... indicates that nothing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process. For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest.

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[2] In *Harris v. Rivera*, 102 S.Ct. 460 (1981), the Supreme Court held that a defendant could not obtain relief by writ of habeas corpus on the basis of inconsistent verdicts rendered after a state bench trial. The Court confirmed "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." 102 S.Ct. at 464.

Id. at 477 (footnote added). The Court further remarked that "[t]he fact that inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." *Id.* (Footnote omitted).

The Supreme Court in *Powell* confirmed the applicability of the *Dunn* rule even where the jury ignores the Court's explicit instructions. Rejecting Powell's argument that the inconsistent verdict necessitated a finding of insufficient evidence, the Court noted that whether approached on a sufficiency of the evidence theory or on a collateral estoppel type theory, the problem remains "that the same jury reached inconsistent results...."[3] The Court added:

> [t]his problem is not altered when the trial judge instructs the jury that it must find the defendant guilty of the predicate offense to convict on the compound offense. Although such an instruction might indicate that the counts are no longer independent, if inconsistent verdicts are nevertheless reached those verdicts still are likely to be the result of mistake, or lenity, and therefore are subject to the *Dunn* rationale.

Id. at 478-79.

Powell appears to countenance no exceptions to the *Dunn* rule. After pointing to the protection afforded criminal defendants by trial and appellate court review of the sufficiency of the evidence, the Court stated that "[w]e do not believe that further safeguards against jury irrationality are necessary." *Id.* at 478. Nothing that "[t]he rule established in *Dunn v. United States* has stood without exception in this Court for 53 years...,"

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[3] The *Powell* Court stated that in such a situation, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Id.* at 478.

the *Powell* court concluded by stating that "[i]f it is to remain that way, and we think it should, the judgment of the Court of Appeals must be [reversed]." *Id.* at 479.

Hughes provides the Court no persuasive justification for taking this case outside *Powell*'s conclusion that "the best course to take is simply to insulate jury verdicts from review" on the ground that the jury reached inconsistent results. *See* 105 S.Ct. at 479.

B. Hughes' Argument Based On Inherent Limitations Of Corporate Criminal Liablity.

Hughes seeks to avoid *Powell* altogether by asking the Court to establish logical limits on the vicarious criminal liability of corporations. Hughes admits that it has found no cases circumscribing the attribution theory underlying corporate criminal liability in the context of an inconsistent verdict. The cases, according to Hughes, have instead focused on the sufficiency of evidence against a convicted corporation where individual agents were acquitted, finding that such inconsistency does not by itself render the evidence against the corporation insufficient. *See United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1008 (9th Cir. 1972) (despite employee's acquittal, evidence connecting employee with conspiracy to violate the Sherman Act could be considered as against employer corporation in testing the sufficiency of evidence supporting conviction of employer).

Hughes thus directs the Court to *City of Los Angeles v. Heller*, 106 S.Ct. 1571 (1986), which it argues offers support for the imposition of logical and legal limits on vicarious liability. *Heller* was a civil rights action brought under 42 U.S.C. § 1983 against the City of Los Angeles, individual members of the city's police commission, and two police officers. The plaintiff contended that the officers had arrested him without probable cause and had used excessive force. One of the officers prevailed on summary judgment. The court bifurcated the action, severing the claims brought under

Monell v. Dept. of Soc. Serv. of City of N.Y., 98 S.Ct. 2018 (1978), and trying the claims against the remaining police officer. The jury, which had not been instructed on any affirmative defenses such as qualified immunity, returned a verdict for the officer. The District Court subsequently dismissed the *Monell* claims on the grounds that exoneration of the officer precluded liability on the part of the city or the commissioners. The Ninth Circuit reversed the dismissal of the *Monell* claims on the grounds that the verdict did not necessarily negate the existence of a constitutional injury, but might instead have been based on a belief that the officer was entitled to a good faith defense. 106 S.Ct. at 1572.

The Supreme Court, in a per curiam opinion, agreed with the district court and reversed the Ninth Circuit holding. The Court noted the lack of any instruction on affirmative defenses and stated that juries must be assumed not to base their decisions on legal questions with respect to which they have not been charged. *Id.* at 1573. The Court observed that the city and the commissioners "were sued only because they were thought legally responsible for [the officers'] actions" and remarked that "if the latter inflicted no constitutional injury on respondent, it is inconceivable that [the city and police commissioners] could be liable to respondent." *Id.* The Court thus concluded that because it had been determined that the claimant suffered no constitutional injury, the claimant would not be able to establish the damages element of the *Monell* claims. *Id.*

Hughes suggests that *Heller* turns on the consequences of a vicarious liability theory, and that it should not be distinguished merely as a civil case not subject to the rule permitting inconsistent verdicts in criminal cases. Hughes goes so far as to suggest that the *Heller* majority must have considered and rejected an inconsistent verdict analysis because such an approach was explicitly taken up by Justice Stevens' dissent. *See id.* at 1576. The government argues persuasively that *Heller* is distinguishable as a civil case and further notes the

dissent's recognition that "[i]n a criminal case, a jury's apparently inconsistent verdict is allowed to stand...," but that "[i]n a civil case, the rule is less clear." *Id.*

Even putting the distinction between civil and criminal cases aside, *Heller* offers little support for Hughes' argument. Hughes attempts to draw an analogy between the vicarious liability assigned to a municipality in a civil rights action and the vicarious liability imputed to a corporation through its employee, arguing through *Heller* that the general tolerance of inconsistent verdicts in criminal cases should be restricted in vicarious liability situations. *Heller* did not, however, present a vicarious liability situation. Despite the Supreme Court's observation that the city and police commissions "were sued only because they were thought legally responsible for" the police officers' actions, 106 S.Ct. at 1573, municipal liability under *Monell* would not have been imputed to the city through its employment of the police officers. *Monell*, 98 S.Ct. at 2036-38. Rather, if found liable, the city would have been directly liable for damage caused by its own custom or policy. *Id.* The *Heller* Court based its holding on the plaintiff's failure to establish an element of the *Monell* cause of action (constitutional injury), and not on any circumscription of attributed liability. The *Monell* imputation truly analogous to corporate criminal liability is that which assigns a municipality liability for the actions of its policymakers. In *Heller*, of course, the claims against the police commissioners had been severed along with the claims against the city, and imputation of the commissioners' actions to the city had not yet been put in issue.

The government, in support of the viability of corporate criminal liability under the circumstances of this case, directs the Court to *United States v. Cargo Service Stations, Inc.*, 657 F.2d 676 (5th Cir. 1981). That case involved the prosecution of a number of corporations and individuals for a criminal conspiracy to fix prices in violation of the Sherman Act. Citing Supreme Court and Fifth Circuit authority for the permissibility of inconsistent verdicts, the Fifth Circuit rejected

the appellant corporations' argument that they were entitled to a judgment notwithstanding the verdict because "every person who could have acted as their agent has been acquitted of criminal wrongdoing." *Id.* at 685.

Hughes argues that *Cargo Services* is merely one more "inconsistent verdict" case and attempts to pierce the appellants' representation—unchallenged by the *Cargo Services* court—that every person who could have acted as their agent had been acquitted. Hughes points out that while five corporations appealed the verdict, only three individuals had been acquitted, suggesting that other possible agents must have been involved in the alleged conspiracy.[4] Toward the same end, Hughes points out that nineteen current or former employees of the indicted companies testified to price-fixing conduct. These arguments by Hughes amount to pure speculation. The *Cargo Services* court clearly accepted the appellants' representation at face value and felt the substantial authority supporting inconsistent verdicts in criminal cases to be sufficient to uphold a corporation's conviction in the face of its only agent's acquittal. The government takes precisely this position in the instant case.

Hughes provides no authority supporting its assertion that in light of LaRue's acquittal, Hughes' conviction "gives the corporate agent fiction a weight it simply cannot bear." *Braswell v. United States*, 487 U.S. 99, 128 (1988) (Kennedy, J., dissenting). In consequence, the Court sees no reason to distinguish inconsistent verdicts in the context of corporate criminal liability from inconsistent verdicts in other kinds of criminal cases.

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[4] It is of course possible that an individual defendant acted as an agent for more than one of the corporate defendants. At least two of the five corporate appellants, Cargo Gasoline Company and Cargo Service Stations, Inc., appear to have been related. *See* 657 F.2d at 678.

B. Hughes' Argument For Application Of The "Rule Of Consistency."

Despite the encompassing reasoning of *Powell*, Hughes attempts to invoke the traditional rule rejecting conviction of an alleged conspirator where all his alleged coconspirators have been acquitted. *See Hartzel v. United States*, 64 S.Ct. 1233, 1234 n.3 (1944). Prior to *Powell*, the Ninth Circuit articulated and circumscribed this so-called "rule of consistency" in *United States v. Patterson*, 678 F.2d 774 (9th Cir. 1982), as follows:

> acquittal of all but one of the alleged conspirators requires acquittal of the remaining defendant. [Citation omitted.] However, if an indictment refers to unknown persons as coconspirators and the government supplies evidence to support a charge that the defendant conspired with the unknown persons, a conspiracy conviction will stand even if all other named defendants are acquitted.

678 F.2d at 781, citing *Lubin v. United States*, 313 F.2d 419, 423 (9th Cir. 1963). The government maintains that the "rule of consistency" was repudiated in *U.S. v. Valles-Valencia*, 823 F.2d 381 (9th Cir. 1987). Alternatively, the government argues, the evidence that unindicted Hughes employees participated in the conspiracy removes this case from the "rule of consistency." Hughes seizes on certain ambiguous language in *Valles-Valencia* to argue that on the narrow facts of this case, *Patterson's* "rule of consistency" survives and commands Hughes' acquittal. Hughes' position is without merit.

The Ninth Circuit's original opinion in *Valles-Valencia*, at 811 F.2d 1232 (9th Cir. 1987), applied the "rule of consistency" to vacate the conviction of one defendant where the other alleged conspirators had been acquitted of that charge (four by the Court and two by the jury.) The government successfully petitioned for rehearing. In its second opinion, the Ninth Circuit acknowledged that in *Powell* the Supreme Court

"has rejected 'a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them.'" *Id.*, quoting *Powell*, 105 S.Ct. at 478. The Ninth Circuit stated that the rationale of *Powell* applies not just to cases involving multiple charges against the same defendant, but also to those which, like the case presently before the Court, involve charges against different defendants. 823 F.2d at 382.

As the government suggests, *Valles-Valencia* is most reasonably read simply to repudiate the "rule of consistency" in favor of reliance solely on a review of the sufficiency of the evidence supporting conviction. Hughes nonetheless seizes on certain ambiguities emphasized in the following passage from the opinion to argue that a sliver of the doctrine remains effective:

> [w]e now reconsider the "rule of consistency" in light of the Supreme Court's recent holding in *Powell*. Because of the *Powell* decision, the broad language from *Lubin* to the effect that the acquittal of all but one of the alleged co-conspirators requires the acquittal of the remaining defendant can no longer be relied upon. *Each case must be examined carefully to see whether evidence of conspiring with others, known or unknown, was produced during the trial.* Our earlier cases relying on the broad language must be deemed overruled *in part* by the Supreme Court's decision in *Powell*.
>
> As the government points out in its petition for rehearing and suggestion for rehearing en banc, there was evidence that there were unindicted co-conspirators and *indicted co-conspirators who were acquitted. The jury verdicts indicated that the jury knew how to acquit those whose guilt was not proved beyond*

> *a reasonable doubt and knew how to convict those whose guilt was satisfactorily proven.*

Id. (Emphasis added.) Hughes argues that *Valles-Valencia* confirms the continuing validity of the Ninth Circuit's earlier holding in *Patterson, supra*, requiring the Court to carefully examine the record to see if there was sufficient proof of a conspiracy between the defendant and someone other than his acquitted co-defendant(s). Based on the *Valles-Valencia* court's statement that the jury "knew how to acquit" some and "knew how to convict" others, Hughes argues that the court took into account evidence against "indicted co-conspirators who were acquitted" by the court, but not evidence concerning the two who were acquitted by the jury. Specifically, Hughes argues that the second *Valles-Valencia* opinion amounts to a reversal of the panel's previous conclusion that the district court's judgment of acquittal in favor of certain defendants precluded the appellate court from consideration of evidence concerning those defendants in evaluating the sufficiency of evidence against the remaining alleged conspirator. Hughes accordingly argues that because LaRue was acquitted by a jury, this Court can sustain Hughes' conviction only if there was sufficient evidence of a conspiracy among Hughes agents other than LaRue.

Hughes' suggestion that the *Valles-Valencia* court would leave this purported distinction between judge-acquitted and jury-acquitted defendants either entirely implicit or, at best, referenced in the most oblique fashion, is untenable. Moreover, Hughes' proffered interpretation flies in the face of *Powell*, the encompassing nature of which was recently noted by the Ninth Circuit in *United States v. Hart*, 92 Daily Journal D.A.R. 6186 (9th Cir. 1992). A far more reasonable reading of *Valles-Valencia* is that it merely affirms the need to examine the sufficiency of the evidence that the convicted defendant was party to an illegal agreement. Cases relying on *Lubin* were overruled "in part" because those cases likely resolved issues unrelated to the "rule of consistency." The "rule of

consistency" no longer exists apart from a requirement that there be sufficient evidence of an agreement between the convicted party and some other person.

Hughes cannot win a judgment of acquittal though reliance on the "rule of consistency" as circumscribed by *Patterson*.

C. Hughes' Argument That The Evidence Against It Is Insufficient.

Hughes' final argument for judgment of acquittal is that the evidence adduced at trial was insufficient under F.R.Civ.[sic]P. 29. The test for review of the sufficiency of the evidence to support a criminal conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 99 S.Ct. 2781, 2789 (1979) (emphasis original). Noting that this criterion "impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law...," *id.*, the *Jackson* Court observed that "[t]he question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached." *Id.* at n.13. Furthermore, the reviewing court is to respect the province of the jury to determine the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from proven facts by assuming that the jury resolved all such matters in a manner supporting the verdict. *U.S. v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990).

Hughes itself acknowledges that "in assessing the sufficiency of the evidence against a convicted corporation, a reviewing court may affirmatively consider the conduct of an acquitted agent." Defendants' motion, p. 7 lines 17-21, citing *United States v. Hilton Hotels Corp.*, *supra*, 467 F.2d at 1008. In assessing the evidence against Hughes, LaRue's acquittal

must be disregarded, and evidence of his participation in the alleged conspiracy must be considered.

Because the evidence supporting Hughes' culpability as defined by the jury instructions surpassed the *Jackson v. Virginia* standard, Hughes may not be granted judgment of acquittal based on insufficiency of evidence.

D. Hughes' Motion In The Alternative For A New Trial.

Hughes makes its F.R.Civ.[sic]P. 33 motion for a new trial on the same bases as its Rule 29 motion for judgment of acquittal, but notes that the motion for new trial affords the Court greater latitude in reviewing the evidence. As explained by Wright:

> [o]n a motion for judgment of acquittal, the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt, the motion for acquittal must be denied.
>
> On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

Wright, Federal Practice and Procedure: Criminal 2d §553. The Ninth Circuit has stated that a motion for a new trial "should be granted 'only in exceptional cases in which the evidence preponderates heavily against the verdict.'" *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981), citing Wright at §553.

Because it cannot be said that the evidence "preponderates heavily" against Hughes' conviction, the motion for a new trial is denied.

III. Conclusion.

Under *Powell*, *supra*, the jury's verdict, despite its stark inconsistency, is simply beyond the review of this Court except as to the sufficiency of the evidence. The evidence supporting Hughes' conviction was not legally insufficient. For these reasons, Hughes' motion for judgment of acquittal, and its motion in the alternative for a new trial, are both DENIED.

DATED: SEP 8- 1992

/s/
Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal No. 91-1022 WMB

United States Of America,
Plaintiff,

v.

Hughes Aircraft Co., Inc. and Donald Anthony LaRue,
Defendants.

EXCERPT OF TRANSCRIPT OF PROCEEDINGS
JURY INSTRUCTIONS
JUNE 10, 1992

[18] THE COURT: Now turning, ladies and gentlemen, to the charges themselves. The indictment in this case arises under two sections of the United States Code, section 371 and 1001, and the relevant portions of those sections read as follows:

As to 371, which is the basis for the charge in Count 1: If two or more persons conspire either to commit an offense against the United States or to defraud the United States or any agency thereof in any manner or for the purpose—excuse me.

Counsel, it seems to me there is a typo there. It should be "for the"—

MR. NEWHOUSE: For any purpose, your Honor.

THE COURT: I think that's right. Let me read it to you again, ladies and gentlemen.

If two or more persons conspire either to commit an offense against the United States or defraud the United States or any agency thereof in any manner or for any purpose and one

or more such persons do an act to effect the object of the conspiracy, each shall be guilty of an offense against the United States.

Section 1001 reads: Whoever in any manner within [19] the jurisdiction of any department or agency of the United States knowingly and willfully makes any false or fraudulent statements or representations shall be guilty of an offense against the United States.

Defendant, Hughes Aircraft Company, Inc., is a corporation, and a corporation is a legal entity and it may be found guilty of a criminal offense.

A corporation, of course, cannot act for itself. It may act only through its employees who are authorized to act for the corporation. A corporation is legally responsible for those acts or omissions of its employees made or performed within the scope of their employment and with the intent to benefit the corporation.

To find a corporation defendant guilty, you must find beyond a reasonable doubt that all the essential elements of the offenses that are set forth in these instructions, which I'll give you in a moment, are present as to the corporation in the form of acts or omissions of its employees who were—excuse me—acts or omissions of its employees that were performed within the scope of their employment.

Whether the employees' acts or omissions were committed within the scope of their employment is a question of fact for you. To be acting within his employment, the employee must first have intended that this act would [20] produce some benefit to the corporation although that does not have to be his only intent.

Second, the employee must have been acting within his authority. An act within the employee's authority—an act was within the employee's authority if it was directly related to the performance of the type of duties that the employee had the

general authority to perform, judging from his position with the company, the responsibility previously entrusted to him and the circumstances surrounding his past conduct. The fact that an employee is not a high managerial official will not, by itself, relieve the corporation of responsibility of the employee's act.

In these instructions, I'm going to be using the terms "knowingly" and "willfully," and I'll define those terms for you now.

An act or failure to act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

An act is done willfully if done voluntarily and intentionally and with the specific intent to do something that the law forbids, that is to say, with bad purpose to either disobey or disregard the law.

Now, turning to Count 1 of the indictment, the defendants are charged in Count 1 of the indictment with conspiring to defraud the United States and to make false [21] statements to the United States in violation of the code sections I mentioned to you earlier. In order for the defendants to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that beginning in or about the year of 1985 and ending in January of 1987, there was an agreement between two or more persons to commit at least one crime as charged in the indictment, with all of you agreeing as to which crime;

Second, that Defendant LaRue and Defendant Hughes, Hughes acting through LaRue, and at least one of the unindicted co-conspirators, namely, James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby, were members of the conspiracy knowing of at least one of its objects, the objects being to defraud the United States or to make false statements to the United States and intending to help accomplish it, with all

of you agreeing which object of the conspiracy the members intended to accomplish;

And, third, that the existence of the—that during the existence of the conspiracy, one of the members of the conspiracy performed at least one of the overt acts set forth in the indictment for the purpose of carrying out the conspiracy, with all of you agreeing on the particular overt act that you find was committed.